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In the
Supreme Court of the United States

OCTOBER TERM, 1995

RANGER INSURANCE COMPANY,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the procedure used by the State of Louisiana to forfeit the bail bond in these proceedings violated the due process rights of the surety on the bail bond under the 14th Amendment to the United States Constitution.

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RANGER INSURANCE COMPANY is a Delaware corporation with its principal office in Houston Texas. It is a wholly owned subsidiary of Fairfax Financial Holdings, Limited, of Canada.

TABLE OF CONTENTS

Page

Questions Presented for Review.....i

List Of All Parties.....ii

Table of Contents.....iii

Table of Cited Authorities.....iv

Citations Of Opinions And Orders In This Case.....vi

Statement of Jurisdiction.....vii

Constitutional Provisions Involved In This Case.....viii

Statement Of The Case.....1

Argument.....4

Appendix:

Appendix A.....A-1

Appendix B.....A-2

TABLE OF CITED AUTHORITIES

CASES **Page**

Armstrong v. Manzo, 380 U.S. 545, 550, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).....4

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972).....4,5,6,8

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).....6

Kirk v. United States, 204 U.S. 688, 27 S.Ct. 788, 51 L.Ed. 671 (1907, affirming *Kirk v. United States*, 137 F. 753 (70 C.C.A. 187) (1905).....5

Mennonite Board of Missions v. Adams, 462 U.S. 799, 103 S.Ct. 2706, 77 L.Ed.2d 195 (1983).....8

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950).....4

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).....5

Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988).....4,7

Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969).....5

TABLE OF CITED AUTHORITIES (continued)

CASES **Page**

United States v. James Daniel Good Real Property, 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).....4

United States v. One 1936 Model Ford V-8, Etc., 307 U.S. 219, 59 S.Ct. 861, 83 L.Ed. 1249 (1939).....5

Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).....6

Other Authorities

Constitution of the United States, Fourteenth Amendment.....i,vii, 3,4,5,6,9

28 United States Code 1257(3).....vii

La.R.S. 40:967(C)&(F).....1

La.R.S. 15:571.11(L)(1)(a)(i) and (ii).....6

La.C.Cr.P. art. 701.....2,7

La.C.Cr.P. art. 344.....8

La.R.S. 15:85.....8

CITATIONS OF OPINIONS AND ORDERS IN THIS CASE

CASE **Page**

State of Louisiana v. Jaime L. Gonzalez, 95-1063 (La.App. 3rd Cir. 3/27/96), 670 So.2d 813, decision not published.....A-2

State of Louisiana v. Jaime L. Gonzalez, 96-C-1045 (La.5/31/96), 674 So.2d 262, writ denied.....A-1

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Louisiana as rendered on May 31, 1996. Title 28, United States Code, Section 1257(3) confers jurisdiction on this Court to review the judgment in question by a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of the law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On September 18, 1991, Jaime L. Gonzalez was arrested in Calcasieu Parish, State of Louisiana, and charged with speeding and possession of more than four hundred (400) grams of cocaine in violation of La.R.S. 40:967(C)&(F). Gonzalez's bond was set at $200,000.00.

Ten days later, on September 28, 1991, Gonzalez as principal and petitioner, RANGER INSURANCE COMPANY (hereinafter referred to as "RANGER"), as surety, placed a bail bond into the criminal proceedings. The bail bond was sufficient to obtain the release of Gonzalez from custody.

Sometime thereafter, the matter was transferred from the State of Louisiana to the federal authorities. Gonzalez was indicted in the United States District Court for the Western District of Louisiana in U.S.D.C. No. 92-20021 on June 17, 1992. The indictment against Gonzalez was later dismissed on July 16, 1992.

On June 2, 1994, nearly three years after his arrest, the Grand Jury for the Parish of Calcasieu indicted Gonzalez. On August 15, 1994, the state moved to schedule Gonzalez's arraignment for August 29, 1994. The district court's record in this matter contains a copy of a "Notice of Arraignment" addressed to Gonzalez. The notice indicates that a copy should be sent to the agent for RANGER. An unknown hand placed the notation "8/16" upon the copy of the notice.

Jaime Gonzalez did not appear for arraignment on

August 29, 1994. The matter was passed on the motion of the state. The state again moved to pass the matter on September 2, 1994. On September 7, 1994, the state moved to forfeit the bail bond. Upon the hearing of evidence, the trial court ordered the bond forfeited. A written judgment of bond forfeiture was signed in chambers on September 8, 1994.

The state in this matter did not issue notice to the surety, RANGER, or any agent of the surety, for the September 2, 1994, or September 7, 1994, court dates. RANGER received no notice that a hearing to forfeit the $200,000.00 bail bond that it placed into the criminal proceedings was scheduled by the state for September 7, 1994. No representative of the surety was present at the hearing on that date.

RANGER filed a "Petition for Nullity of Judgment, Motion for Discharge and Release of Surety" with the Fourteenth Judicial District Court for the Parish of Calcasieu on March 6, 1995. RANGER alleged therein that the judgment of bond forfeiture was a nullity because the prosecution was not timely instituted citing La.C.Cr.P. art. 701. The surety further alleged that the state failed to give RANGER the constitutionally and statutorily required notice of the bond forfeiture hearing.

On April 19, 1995, the trial court summarily denied the petition and motion filed by the petitioner herein. As to the failure of the state to notify the surety of the bond forfeiture hearing, the court stated:

> "...I'm just not intellectually or philosophically, or any other way inclined to think that just because

> the forfeiture did not occur for several days that that lets your company off the hook. I'm just not. You're not going to get that relief from me." (Record page 84, line 21.)

RANGER perfected a suspensive appeal to the Court of Appeal, Third Circuit for the State of Louisiana. RANGER presented and briefed two issues for review to the Court of Appeal. The second issue presented to the Court of Appeal was: "Does the procedure used by the state for forfeiting the bail bond in these proceedings violate the due process rights of the appellant, surety herein?" (Appeal Brief of RANGER INSURANCE COMPANY at page 5.)

On March 27, 1996, the Court of Appeal, Third Circuit, rendered an opinion upholding the action of the trial court. The Court of appeal stated:

> "Ranger also argues the forfeiture procedures utilized by the State did not meet the minimum due process requirements of Article I, Section 2 of the Louisiana Constitution of 1974 and the 14th Amendment to the United States Constitution." (Opinion of Court of Appeal, page 3.)

The Court of Appeal, citing two of its previous decisions, ruled that RANGER'S due process rights were not violated because, "... the surety was not prejudiced when the state chose to delay the bond forfeiture hearing for several days." (Opinion of Court of Appeal, page 4.)

Petitioner again raised the issue of the violation of its due process rights in its writ application to the Supreme

Court of Louisiana. (Application for Writ of Certiorari of RANGER INSURANCE COMPANY, page 4.) On May 31, 1996, the Supreme Court of Louisiana denied petitioner's application for a writ of certiorari.

ARGUMENT

The Due Process clause contained in the Fourteenth Amendment to the United States Constitution mandates that the parties whose rights are to be affected must be afforded the opportunity to be heard. *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). This right to be heard has little reality or worth unless the interested party is informed that the matter is pending and can choose for itself whether to appear or default, acquiesce or contest. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950).

In order to enjoy the right to be heard, a party whose property the State is seeking to seize or forfeit must receive notice. The right to prior notice and a hearing is central to due process. *United States v. James Daniel Good Real Property,* 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). Failure to give notice violates "the most rudimentary demands of due process of law." *Peralta v. Heights Medical Center, Inc.,* 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 550, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62 (1965)). The notice must be extended at a meaningful time and in a meaningful manner. *Fuentes v. Shevin,* 92 S.Ct. at 1994).

So that a party's right to notice and a hearing is given its full force and effect, such notice and opportunity to be

heard must be extended before the State deprives the party of its property interest. *Fuentes,* 92 S.Ct. at 1994, 1995. A deprivation of a property interest that may later be set aside is still a "deprivation" under the Fourteenth Amendment. *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). No later hearing can undo the fact that an arbitrary taking violative of procedural due process has occurred. *Fuentes,* 92 S.Ct. at 1995.

Certainly, the forfeiture of a $200,000.00 bail bond undertaking is a deprivation within the meaning of the Fourteenth Amendment. This Court has not seen fit to distinguish between kinds of property in applying the Due Process Clause. *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601, 608, 95 S.Ct. 719, 723, 42 L.Ed.2d 751 (1975). Further, forfeitures are not favored and should only be enforced when fully within both the letter and spirit of the law. *United States v. One 1936 Model Ford V-8, Etc.,* 307 U.S. 219, 226, 59 S.Ct. 861, 865, 83 L.Ed. 1249 (1939). See also *Kirk v. United States,* 204 U.S. 688, 27 S.Ct. 788, 51 L.Ed. 671 (1907), affirming *Kirk v. United States,* 137 F. 753 (70 C.C.A. 187) (1905). In *Kirk* the Court of Appeal restrained the marshall from seizing property pursuant to a judgment of bail bond forfeiture, stating:

> "In this country, and indeed, in every civilized state, no man can be deprived of his property without due notice and opportunity to be heard and, after giving much consideration to the facts and law presented by this record, we are constrained to think that neither of these privileges has been accorded this complainant." *Kirk,* at 137 F. 753, 755.

The Due Process Clause guarantees the protection of fair procedure. *Zinermon v. Burch,* 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990). The state has a duty to follow a fair process of decisionmaking when it acts to deprive a party of its property. *Fuentes,* , 92 S.Ct. at 1994.

> "It has long been recognized that 'fairness can rarely be obtained by secret, one sided determination of facts decisive of rights...[And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Fuentes,* 92 S.Ct. at 1994, (quoting *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 170-172, 71 S.Ct. 624, 647, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)).

Where the government has a pecuniary interest, the fairness of its decisionmaking is ensured by the requirement of an adversarial hearing. *James Daniel Good Real Property,* 114 S.Ct. at 502. In this matter, the District Attorney's Office for Calcasieu Parish stands to gain thirty percent (30%) of the bond amount plus interest (an amount greater than $60,000), and the Fourteenth Judicial District Court for the Parish of Calcasieu will collect twenty-five percent (25%) of the bond plus interest (an amount greater than $50,000.00). La. R.S. 15:571.11 (L)(1)(a)(i) and (ii).

On September 7, 1994, the State of Louisiana conducted a one-sided hearing to forfeit the sizable bail bond that had been placed in the underlying criminal proceedings. The property rights of petitioner, RANGER INSURANCE COMPANY, related to said bail bond were at stake at this hearing. RANGER received no notice that the State was going

to conduct a hearing on that date. The State had also failed to notify petitioner of the previously scheduled court date of September 2, 1994. No representative of petitioner was present on September 7, 1994, when the trial court ordered the forfeiture of the bail bond.

The State of Louisiana did not meet the minimum requirements of due process in this matter. The State conducted a secret one-sided determination of the property rights of petitioner without issuing any notice for the party to be affected to appear. RANGER was given no opportunity to contest the motion for bond forfeiture before a final judgment was signed, in chambers, by the court.

It may have been that the trial court would have forfeited this bond over the objection of RANGER. However, the relative merits of any defense to a deprivation of property does not obviate the constitutional mandate of notice and the opportunity to be heard. See *Peralta*, 108 S.Ct. at 899. In this matter RANGER did, in fact, have a meritorious defense to the forfeiture action. La.C.Cr.P. art. 701 releases the surety from a bond obligation where the State does not timely institute criminal proceedings. The courts below ruled that this defense was procedurally barred after the entry of the judgment of bond forfeiture. The holding of the Court of Appeal indicates that RANGER had to present this defense at the bond forfeiture hearing, a hearing for which RANGER received no notice.

Issuing notice to RANGER of the date and time of the bond forfeiture hearing imposes a relatively modest administrative burden upon the state. The state may not forgo this burden merely because RANGER is a corporation

engaged in the business of bail. *Cf. Mennonite Board of Missions v. Adams,* 462 U.S. 799, 103 S.Ct. 2706, 77 L.Ed.2d 195 (1983). The state herein can demonstrate no exceptional circumstances that would allow it to ignore the constitutional mandate of notice to the surety prior to forfeiture.

The Court of Appeal held that because RANGER had received notice requiring the appearance of Jaime L. Gonzalez on August 29, 1994, and because RANGER knew that a consequence of Gonzalez's non-appearance might be the forfeiture of the bond, that no further notice was due. *See generally* La.C.Cr.P. art. 344 and La.R.S. 15:85 (notice requirements and procedure for bail bond forfeiture). When Margarita Fuentes signed a contract with the Firestone Tire and Rubber Company she knew that Firestone was entitled to retake possession of the goods that she was purchasing if she failed to make payments under the contract. *Fuentes,* 92 S.Ct. at 1989. This Court held that Fuentes was entitled to notice prior to the repossession of said goods in spite of such knowledge. RANGER is afforded no less due process of notice and the opportunity to be heard under the Fourteenth Amendment. Knowledge of the possible consequences of certain events does not relieve the state of its duty to provide constitutionally mandated notice of the taking of property.

The State of Louisiana failed to give notice and the opportunity to be heard to petitioner, RANGER INSURANCE COMPANY, prior to forfeiting the bail bond placed into the criminal proceedings by RANGER. The district attorney's office and the court had a significant pecuniary interest in the outcome of the forfeiture proceeding. The administrative burden of notice to the petitioner was minimal.

This case marks the sanction by the Supreme Court of Louisiana of a procedure violative of the fundamental requirements of due process as enunciated by this Court. The violation of petitioner's due process rights under the Fourteenth Amendment to the United States Constitution merits the exercise of this Court's sound discretion concerning the grant of certiorari herein.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT
OF THE STATE OF LOUISIANA

STATE OF LOUISIANA

VS. NO. 96-C - 1045

JAIME L. GONZALEZ

IN RE: Ranger Insurance Co.; - Other(s); Applying for Writ of Certiorari and/or Review; Parish of Calcasieu 14th Judicial District Court Div. "G" Number 95-1046; to the Court of Appeal, Third Circuit, Number CA95-1063

May 31, 1996

Denied.

CDK
PFC
WFM
HTL
BJJ
JPV
EJB

WATSON, J. not on panel.

Supreme Court of Louisiana
May 31, 1996

/s/ John Tarlton Olivier

Clerk of Court
For the Court

APPENDIX B

NUMBER 95-1063

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

STATE OF LOUISIANA
Plaintiff-Appellee

NOT FOR PUBLICATION

VERSUS

JAIME L. GONZALEZ
Defendant-Appellant

MAR 27 1996

On Appeal from the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana; the Honorable Charley Quienalty, District Judge, Presiding.

BEFORE: COOKS, PETERS and GREMILLION, JUDGES.

COOKS, Judge.

Ranger Insurance Company, surety of the defendant, Jaime Gonzalez, appeals the trial court's denial of its petition to nullify a judgment of bond forfeiture rendered after Gonzalez failed to appear for arraignment. We affirm.

FACTS AND PROCEDURAL HISTORY

Jaime L. Gonzalez was arrested on September 18, 1991,

for possession of cocaine over 400 grams. On September 28, 1991, Gonzalez executed a contract with a surety, Ranger Insurance Company, to post a bail bond in the amount of $200,000.00 to secure his release from the States custody.The State transferred the records involving Gonzalez's criminal activity for further investigation and prosecution by federal authorities. A federal Grand Jury eventually returned an indictment charging Gonzalez with a violation of 21 U.S.C. §841(a)(1) and 841(b)(1)(A). However, the Grand Jury subsequently returned a Superseding Indictment which, in effect, dismissed the previous indictment and returned the case to the State for prosecution.

La.Code Crim.P. art. 701(B)requires where a defendant is not continued in custody after arrest, an indictment or information shall be filed within 150 days of the arrest if the defendant is booked with a felony. Defendant was not indicted by a State grand jury until June 2, 1994, approximately 975 days after arrest. Defendant and his surety, were served with notice; and, defendant was directed to appear in court on August 29, 1994, for arraignment. Defendant did not appear at the scheduled arraignment. On September 7, 1994, the court ordered a bench warrant and a bond forfeiture. The judgment forfeiting bond was signed the next day.

Receiving notice of the forfeiture Ranger filed a Petition for Nullity of Judgment of Bond Forfeiture, and Motion for Discharge and Release of Surety. After a hearing the court denied Ranger's motion and this appeal followed.

ANALYSIS

Ranger argues the trial court erred in dismissing its

Petition for Nullity of Judgment of Bond Forfeiture without allowing it to present evidence at a contradictory hearing as provided for in La.Code Crim.P. art. 701(B) which states:

> "Failure to institute prosecution as provided in Subparagraph (2) shall result in the release of the bail obligation if, after contradictory hearing with the district attorney, just cause for the delay is not shown."

The State acknowledges Ranger had grounds for an Article 701 contradictory hearing provided if requested such hearing before forfeiture of the bond. Once the forfeiture occurred, the State contends, Ranger was precluded from requesting a contradictory show cause hearing as provided by Article 701.

We agree with the State's argument. Ranger could have provoked a contradictory hearing at any time between the lapse of 150 days after arrest and the defendant's failure to appear. At such hearing, the State would have been required to show good cause why a bill had not been filed. If it could not do so, the trial court was mandated to release Ranger from its bail obligation. However, Ranger did not timely request a hearing. Defendant breached the bail obligation by failing to appear at the scheduled arraignment. Ranger's attempt to invoke the "show cause" provision of Article 701 as grounds for nullity of its obligation to honor the bond is not authorized by statute and comes too late.

Ranger also argues the forfeiture procedures utilized by the State did not meet the minimum due process requirements of Article I, Section 2 of the Louisiana Constitu-

tion of 1974 and the 14th Amendment to the United States Constitution. Specifically, Ranger asserts since the state did not forfeit the bond on the same date defendant failed to appear, due process required that Ranger receive notice of the next, scheduled arraignment date before issuance of an order forfeiting the bond.

In *State v. Bercy,* 628 So.2d 1323 (La.App. 3 Cir. 1993), *writ denied,* 94-0064(La.3/11/94) 634 So.2d 397 and *State v. Cole,* 618 So.2d 4 (La.App. 3 Cir. 1993), this court held defendant's appearance is not required at a bond forfeiture hearing. This court reasoned in *Cole* as follows:

> "Defendant's appearance is not required at a bond forfeiture hearing. Rather, LSA-R.S. 15:85 governs bond forfeiture hearings. Particularly, LSA-R.S. 15:85(A)(1)(a) states that if a defendant fails to appear and answer, after being properly noticed, the trial court, after hearing proper evidence, shall enter judgment, decreeing the forfeiture of the bond. Accordingly, we find that the State was not required to send supplementary notice to the defendant or his surety or the surety's agent of the May 23, 1991, bond forfeiture hearing."
> *Id* at 5.

We concluded in both *Bercy* and *Cole* that the surety was not prejudiced when the state chose to delay the bond forfeiture hearing for several days. The same is true in this case.

DECREE

For the above reasons, the judgment appealed from is affirmed. All costs of this appeal are assessed to appellant, Ranger Insurance Company.

AFFIRMED.

This opinion is not designated for publication. Rules 2-16.2 and 2-16.3, Uniform Rules, Courts of Appeal.

Supreme Court, U.S.
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No. 96-334

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

RANGER INSURANCE COMPANY, Petitioner

VERSUS

STATE OF LOUISIANA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS

OPPOSITION OF THE STATE OF LOUISIANA TO PETITION BY RANGER INSURANCE COMPANY FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

STATEMENT OF THE CASE 1

ARGUMENT 4

CONCLUSION 17

CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

Mennonite Board of Missions v. Adams, 462 U.S. 799, 103 S.Ct. 2706, 77 L.Ed.2d 195 (1983) 5

Moreau v. Federal Energy Regulatory Commission, 982 F.2d 556 (D.C. Cir. 1993).....13

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950) 5

State v. Batiste, 653 So.2d 127.....15

State v. Bercy, 628 So.2d 1323 (La. App. 3rd 1993), writ denied 634 So.2d 397 (La. 1994) 9

State v. Cole, 618 So.2d 4 (La. App. 3rd 1993) 9

State v. Rotramel, 670 So.2d 378 (La. App. 3 Cir. 1996) 9

State v. Roy, 666 So.2d 1124, 1127 (La. App. 3 Cir. 1995) 16

Fourteenth Amendment to the United States Constitution 4

21 U.S.C. § (a)-(1) and 841 (b)(1)(a).....1

La. R.S. 15:85 7

La. R.S. 40:967 (C) & (F) 1

La. C.Cr.P. art. 322 (E) 5

La. C.Cr.P. art. 344 6

The State of Louisiana respectfully submits the following brief in opposition to the petition for Writ of Certiorari filed by the petitioner, Ranger Insurance Company.

STATEMENT OF THE CASE

Jaime L. Gonzalez was arrested on September 18, 1991, for possession of cocaine over 400 grams, a violation of La. R.S. 40:967 (C) & (F). On September 28, 1991, Gonzalez executed a contract with a commercial surety, Ranger Insurance Company, to post a bail bond in the amount of $200,000 to secure his release from State's custody.

Thereafter, the State of Louisiana transferred the matter to the federal authorities for investigation. On June 12, 1992, a federal Grand Jury returned an indictment against Gonzalez charging him with a violation of 21 U.S.C. § (a)(1) and 841 (b)(1)(a). However, subsequent to this on July

16, 1992, the Grand Jury returned a Superseeding Indictment which, in effect, dismissed the previous indictment. The case was then returned to the State for prosecution.

On June 2, 1994, the Grand Jury for the Parish of Calcasieu indicted Gonzalez. Thereafter, on August 15, 1994, the State moved to set Gonzalez's arraignment for August 29, 1994. On August 16, 1994, the requisite notice was sent to the defendant, as well as the agent for Ranger Insurance Company informing them of the defendant's arraignment date. On August 29, 1994, the defendant, Gonzalez, failed to appear. At that time, the State continued the matter until September 2, 1994. Once again the defendant failed to appear.

On September 7, 1994, after being notified that the arraignment notice had been mailed to the defendant and surety on August 16, 1994, the court ordered a bench warrant and

a bond forfeiture. The Judgment of Bond Forfeiture was signed in chambers on September 8, 1994.

Approximately six months later on March 6, 1995, the surety, Ranger Insurance Company, filed a "Petition for Nullity of Judgment of Bond Forfeiture, and Motion for Discharge and Release of Surety" with the Fourteenth Judicial District Court for the Parish of Calcasieu. Ranger's petition and motion were denied by the district court on April 19, 1995. Thereafter, Ranger appealed to the Court of Appeal, Third Circuit for the State of Louisiana, who affirmed the prior determination of the district court. Ranger then filed a Writ of Certiorari with the Supreme Court for the State of Louisiana. Ranger's writ application was denied on May 31, 1996.

Petitioner now applies to this Honorable Court for a Writ of Certiorari. The State of

Louisiana opposes petitioner's writ application. In his application, petitioner alleges one reason for granting a Writ of Certiorari.

ARGUMENT

I. WHETHER THE PROCEDURE USED BY THE STATE OF LOUISIANA TO FORFEIT THE BAIL BOND IN THESE PROCEEDINGS VIOLATED THE DUE PROCESS RIGHTS OF THE SURETY ON THE BAIL BOND UNDER THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellant, Ranger Insurance Company, contends that the forfeiture procedure utilized by the State of Louisiana does not meet the minimum due process notice requirements of the Fourteenth Amendment to the United States Constitution. The crux of appellant's argument is that since the State elected to forfeit the bond on a later date, then as a matter of due process, the surety should have been notified of the exact forfeiture date.

There is no question that the Due Process Clause contained in the Fourteenth Amendment

mandates that the parties whose rights are to be affected must be afforded the opportunity to be heard. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." Mennonite Board of Missions v. Adams, 462 U.S. 799, 103 S.Ct. 2706, 77 L.Ed.2d 195 (1983), citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). For the foregoing reasons, appellee, the State of Louisiana, urges that procedural due process safeguards were fully satisfied in the present case.

La. C.Cr.P. art. 322 (E) provides that by signing a bail bond, the defendant and his surety waive any rights to notice, except the

notice provided for in La. C.Cr.P. art. 344 and La. R.S. 15:85.

La. C.Cr.P. art. 344 (B)(1) and (2) provide:

> (1) When a bail bond does not fix the appearance date, and the presence is required of a person who has been released on bail, the defendant and his personal surety or the commercial surety or the agent or bondsman who posted the bond for the commercial surety, shall be given written notice of the time, date, and place the principal is required to appear.
>
> (2) The notice may be delivered to the defendant and the personal surety or the commercial surety or the agent or bondsman who posted the bond for the commercial surety by an officer designated by the court, at least two days prior to the day set for the appearance; or this notice may be mailed by United States first class mail to the defendant and his personal surety or the commercial surety or the agent or bondsman who posted the bond for the commercial surety, at least three days prior to the day set for the appearance. The notice shall be mailed to the defendant and his personal surety or the commercial surety or the agent or bondsman who posted the

> bond for the commercial surety to the address designated pursuant to Article 322.

However, La. R.S. 15:85 provides the actual procedure for bond forfeitures. This section reads in part:

> All bonds taken to secure the appearance of any person before any court executed in the state of Louisiana shall be forfeited and collected as follows:
>
> (1) Failure to appear and answer. If at the time fixed for appearance the defendant fails to appear and answer when called, the judge, on motion of the prosecuting attorney, upon hearing of proper evidence including: the bail contract; the power of attorney if any; and the notice to the defendant and the surety as required by Article 344 of the Code of Criminal Procedure, shall immediately and forthwith issue a warrant for the arrest of the person failing to appear and order a judgment decreeing the forfeiture of the bond and against the defendant and his sureties in solido for the full amount of the bond.
>
> (2) Signing of the judgment of bond forfeiture. Following the defendant's failure to appear, the court shall sign a written judgment

of bond forfeiture.

(3) Notice of judgment.

(a) After entering the fact of the signing of the judgment of bond forfeiture in the court minutes, the clerk of court shall promptly mail notice of the signing of the judgment of bond forfeiture. The notice of the signing of the judgment shall be mailed by United States certified mail with return receipt to all the following:

(i) The defendant at the address designated pursuant to Code of Criminal Procedure Art. 322.

(ii) The personal sureties at the addresses designated pursuant to Code of Criminal Procedure Art. 322.

(iii) The agent or bondsman who posted the bond for the commercial sureties at the address designated pursuant to Code of Criminal Procedure Art. 322.

(iv) The commercial sureties at the addresses designated pursuant to Code of Criminal Procedure Art. 322. Notice to the commercial sureties shall include the power of attorney number used to execute the bond.

(b) After mailing the notice of the signing of the judgment of bond forfeiture, the clerk of court shall execute an affidavit of the mailing and place the affidavit and the return receipts in the record.

(c) Failure to mail proper notice of the signing of the

> judgment within sixty days after the defendant's failure to appear shall release the sureties of any and all obligations under the bond.

The notice requirement contemplated by La. R.S. 15:85 (1) is that the defendant and his surety be sent notice of the defendant's initial appearance as required by La. C.Cr.P. art. 344. The State is not required to send notice to the defendant and his surety of the subsequent bond forfeiture hearing.

In the recent case of State v. Rotramel, 670 So.2d 378 (La. App. 3 Cir. 1996), the court revisited the issues previously before it in State v. Cole, 618 So.2d 4 (La. App. 3rd 1993) and State v. Bercy, 628 So.2d 1323 (La. App. 3rd 1993), writ denied 634 So.2d 397 (La. 1994). In Rotramel, the court discussed at length the application of bond forfeiture proceedings as follows:

> While the prosecuting attorney has some discretion as to when he

may move for a bond forfeiture, it is not without the limitations as prescribed in La.R.S. 15:85. Upon moving for a bond forfeiture, the prosecuting attorney must present the necessary proof to the trial judge, who must immediately and forthwith issue the bond forfeiture. The trial judge must then sign a written judgment of bond forfeiture. Next, the clerk of court has to enter the signing of the judgment into the court minutes. The clerk must then promptly mail notice of the signing by certified mail, return receipt requested to the defendant and the agent or bondsman at the address shown on the bond and to the surety at the address listed on the power of attorney. Failure of the clerk of court to mail the proper notice to the parties within sixty days after the defendant's failure to appear releases the surety of its obligation under the bond agreement. The state, therefore, has a sixty day window from the defendant's non-appearance to fulfill the requirements of the statute. If the state does not meet these requirements, the surety is released from its obligation. Finally, the statute provides for the use of summary process by the surety to raise defenses and actions in nullity. La.R.S. 15:85(5). The bond forfeiture statute clearly provides specific

> procedures, with safeguards, that must be followed when the prosecuting attorney moves for a bond forfeiture after a criminal defendant fails to appear at the appointed time. Thus, the surety is provided with substantial constitutional due process.
>
> A clear reading of La.R.S. 15:85 reflects that the trial judge has no authority to render a bond forfeiture sua sponte. Further, there is no legislative mandate, nor jurisprudential authority that requires the state to move for a bond forfeiture at the time the defendant fails to appear.

State v. Rotramel, 670 So.2d 378 at 380, 381.

In the present case, although appellant alludes otherwise, there is notably no denial that Gonzalez and his surety, Ranger, were properly notified of the August 29, 1994, arraignment hearing. Gonzalez did not appear and a record was made of his absence from the proceedings. At that time, the State continued the matter until September 2, 1994, whereupon once again Gonzalez failed to appear.

On September 7, 1994, the State moved to

forfeit the bond and a hearing was held on that date at which time the evidence required by La. R.S. 15:85 was provided. Upon hearing the evidence, the trial judge ordered a bench warrant for Gonzalez and the bond forfeited. The Judgment of Bond Forfeiture was signed in chambers the next day on September 8, 1994. Subsequently, the judgment was recorded in the court minutes and thereafter notice of judgment was mailed to Ranger as required by La. R.S. 15:85.

Ranger urges that its procedural due process rights were hampered when it did not receive subsequent notice of the September 2, 1994, or September 7, 1994, hearing dates. However, this commercial surety was fully aware of the possible consequences of the defendant's failure to appear on August 29, 1994, and there is absolutely no indication that this surety or any of its agents attempted to attend the

arraignment hearing to set forth any possible defenses.

In Moreau v. Federal Energy Regulatory Commission, 982 F.2d 556 (D.C. Cir. 1993), the court, although recognizing that the purpose of notice is to inform the recipient that the matter in which his protected interests are at stake is pending, held that "....the Due Process Clause does not require notice where those claiming an entitlement to notice already knew the matters of which they might be notified." Moreau, supra, at 569. In this case there is no question that Ranger received notice of the August 29, 1994, arraignment date. Since the bond could have been forfeited on August 29, 1994, subsequent notice would not have apprised Ranger of any information it did not have upon receipt of the notification of the August 29, 1994, hearing date.

In brief, Ranger intimates that the State

conducted a "secret one-sided" determination of their property rights without issuing any notice. This is simply not the case. As indicated in appellant's brief, "This right to be heard has little reality or worth unless the interested party is informed that the matter is pending and can choose for itself whether to appear or default, acquiesce or contest." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed.2d 865 (1950).

After receiving notice of the August 29, 1994, arraignment date, Ranger could have attended this hearing and set forth any defenses it felt had merit. Ranger chose not to do so of their own free will. This had nothing to do with any sleight of hand by the State in order to advance its pecuniary interest as has been implied by Ranger.

The State of Louisiana did in fact give

the surety, Ranger Insurance Company, requisite notice, comporting with procedural due process standards when it notified defendant and his surety, Ranger, of the August 29, 1994, arraignment date. The proceedings held on September 7, 1994, were essentially the same proceedings which could have been held on August 29, 1994. Ranger was not prejudiced in the instant case when the State held the bond forfeiture hearing on September 7, 1994.

If the state, in its discretion, can move for forfeiture on the date of nonappearance without having to notify the surety of the fact that defendant failed to appear, the state likewise does not have to notify the surety of the defendant's nonappearance to move for forfeiture at a later date. In the interim period, the bond remains enforceable. State v. Batiste, 653 So.2d 127. Additionally, there is no requirement in either La.Code Crim.P. art.

344 or La.R.S. 15:85 that the state notify the surety of the bond forfeiture hearing date. State v. Roy, 666 So.2d 1124, 1127 (La. App. 3 Cir. 1995).

The State of Louisiana submits it has complied with all of the procedural due process requirements mandated by the Fourteenth Amendment to the United States Constitution. Appellant's writ application requesting that this Court grant certiorari should be denied since there has been no violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

Based upon the above and foregoing reasons, the State of Louisiana respectfully submits that there was no error in the ruling of the Louisiana Supreme Court. Therefore, the application for Writ of Certiorari filed on behalf of the petitioner, Ranger Insurance Company, should be denied by this Honorable Court.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Opposition of the State of Louisiana to Petition by Ranger Insurance Company for Writ of Certiorari have been sent by certified mail, return receipt requested No. P 295 591 691 to William Noland, Counsel of Record, 2739 Tulane Avenue, P.O. Box 26183, New Orleans, LA 70186, (504) 822-3104 this _____ day of _____, 1996.

_____
PAUL P. REGGIE
Assistant District Attorney